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BEFORE THE
FEDERAL ELECTION COMMISSION

Public Citizen
ProtectOurElections.org
ProsperityAgenda.us,
Center for Media and Democracy

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v.

American Future Fund
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OFFICE OF GENERAL
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COMPLAINT

1. This complaint is filed pursuant to 2 U.S.C. § 437g(a)(1) and is based on information and belief that American Future Fund has violated provisions of the Federal Election Campaign Act (FECA), 2 U.S.C. § 431 *et seq.* Based on published reports, complainants have reason to believe that American Future Fund has violated the law by raising and spending significant amounts of money to influence the 2010 congressional elections without (1) registering as a political committee, as required by 2 U.S.C. § 433, (2) filing political committee

financial disclosure reports required by 2 U.S.C. § 434, and (3) complying with the political committee organizational requirements of 2 U.S.C. § 432.¹

2. "If the Commission, upon receiving a complaint . . . has reason to believe that a person has committed, or is about to commit, a violation of [the FECA] . . . [t]he Commission shall make an investigation of such alleged violation" 2 U.S.C. § 437g(a)(2); *see also* 11 C.F.R. § 111.4(a) ("Any person who believes that a violation . . . has occurred or is about to occur may file a complaint . . .") (emphasis added).

3. Where there is reason to believe that an organization such as American Future Fund is violating FECA through its failure to register as a political committee and comply with political committee organizational and reporting requirements, investigation by the Commission is critical and necessary—because complainants and the public do not have access to all of the relevant information. As the Commission explained in its Supplemental Explanation and Justification on Political Committee Status, 72 Fed. Reg. 5595, 5597 (Feb. 7, 2007) (hereinafter "SE&J on Political Committee Status"):

The Federal courts' interpretation of the constitutionally mandated major purpose doctrine requires the Commission to conduct investigations into the conduct of specific organizations that may reach well beyond publicly available advertisements. *See, e.g., Malenick*, 310 F. Supp. 2d at 234–36 (examining organizations' materials distributed to prospective donors). The Commission may need to examine statements by the organization that characterize its activities and purposes. The Commission may also need to evaluate the organization's spending on Federal campaign activity, as well as any other spending by the

¹ Published reports suggest that American Future Fund is neither coordinating its expenditures with candidates nor making contributions directly to candidates—meaning that American Future Fund likely qualifies as an "independent expenditure only" committee under the Commission's Ad. Ops. 2010-09 and 2010-11 and, therefore, is not subject to the contribution restrictions of 2 U.S.C. §§ 441a and 441b. For this reason, complainant limits its allegations to violations of the political registration and reporting requirements of 2 U.S.C. §§ 433 and 434. However, in the event that American Future Fund makes contributions to candidates or coordinates its expenditures with candidates, it may also be in violation of 2 U.S.C. §§ 441a and 441b.

organization. In addition, the Commission may need to examine the organization's fundraising appeals.

SE&J on Political Committee Status, 72 Fed. Reg. at 5601 (emphasis added).

I. Background

4. In 2004, the first federal election cycle conducted under Bipartisan Campaign Reform Act of 2002 (BCRA) ban on national political party committee use of soft money, organizations claiming federal income tax exemption under sections 527 and 501(c)(4) took the national stage and illegally spent hundreds of millions of dollars to influence the 2004 federal elections. Many complaints were filed with the Commission regarding this illegal activity in 2004. More than two years after the election, the Commission began announcing its determinations that many tax-exempt organizations (principally 527 organizations, but at least one 501(c)(4) organization) had indeed violated federal campaign finance laws and that, consequently, the Commission was collecting record fines through conciliation agreements with these groups.²

5. The Supreme Court in *McConnell v. FEC*, 540 U.S. 93, 165 (2003), took specific note of "the hard lesson of circumvention" that is taught "by the entire history of campaign

² See, e.g., "FEC Collects \$630,000 In Civil Penalties From Three 527 Organizations," <http://fec.gov/press/press2006/20061213murs.html> (Dec. 13, 2006); "Freedom Inc. Pays \$45,000 Penalty for Failing to Register as Political Committee," <http://www.fec.gov/press/press2006/20061220mur.html> (Dec. 20, 2006); "FEC to Collect \$750,000 Civil Penalty From Progress For America Voter Fund," <http://fec.gov/press/press2007/20070228MUR.html> (Feb. 28, 2007); "FEC Collects \$78,000 Civil Penalty From The National Association of Realtors 527 Fund," <http://fec.gov/press/press2007/20070619NARMURs.shtml> (June 19, 2007); "FEC to Collect \$775,000 Civil Penalty From America Coming Together," <http://fec.gov/press/press2007/20070829act.shtml> (Aug. 29, 2007); "Club for Growth Agrees to Pay \$350,000 Penalty for Failing to Register as a Political Committee," <http://fec.gov/press/press2007/20070905cfg.shtml> (Sept. 5, 2007); and "Media Fund to Pay \$580,000 Civil Penalty," <http://fec.gov/press/press2007/20071119mediafund.shtml> (Nov. 19, 2007).

finance regulation.” The deployment of section 501(c)(4) organizations in 2010 as a vehicle for undisclosed money to pay for partisan activities to influence federal elections is simply the latest chapter in the long history of efforts to evade and violate federal campaign finance laws.

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6. The Supreme Court in *McConnell* took specific—and repeated—note of the central role of the FEC in improperly creating the soft money loophole that was used by federal candidates and political parties to circumvent federal campaign finance laws. The massive flow of soft money through the political parties into federal elections was made possible by the Commission’s allocation rules, which the Court described as “FEC regulations [that] permitted more than Congress, in enacting FECA, had ever intended.” 540 U.S. at 142 n.44. Indeed, the Court noted that the existing Federal Election Campaign Act (FECA), which had been upheld in *Buckley*, “was subverted by the creation of the FEC’s allocation regime,” which allowed the parties “to use vast amounts of soft money in their efforts to elect federal candidates.” *Id.* (emphasis added). The Court flatly stated that the Commission’s rules “invited widespread circumvention” of the law. *Id.* at 145.

7. It is critically important that the Commission not repeat this history here. The Commission must ensure that it does not once again subvert and invite “widespread circumvention” of the law by licensing the spending of massive amounts of undisclosed money to influence federal elections, through section 501(c)(4) groups whose major purpose is to influence federal elections.

II. Political Committee Status

8. FECA defines the term “political committee” to mean “any committee, club, association or other group of persons which receives contributions aggregating in excess of \$1,000 during a calendar year or which makes expenditures aggregating in excess of \$1,000

SE&J on Political Committee Status, 72 Fed. Reg. at 5597 (emphasis added).

11. For the reasons set forth above, there is a two prong test for "political committee" status under the federal campaign finance laws: (1) whether an entity or other group of persons has a "major purpose" of influencing the "nomination or election of a candidate," as stated by *Buckley*, and if so, (2) whether the entity or other group of persons receives "contributions" or makes "expenditures" of \$1,000 or more in a calendar year.

12. Prong 1: The "major purpose" test. The Commission takes a case-by-case approach to applying the "major purpose" test. The Commission explained this approach in its SE&J on Political Committee Status.

The Supreme Court has made it clear that an organization can satisfy the major purpose doctrine through sufficiently extensive spending on Federal campaign activity. See *MCFL*, 479 U.S. at 262 (explaining that a section 501(c)(4) organization could become a political committee required to register with the Commission if its "independent spending become[s] so extensive that the organization's major purpose may be regarded as campaign activity").

An analysis of public statements can also be instructive in determining an organization's purpose. Because such statements may not be inherently conclusive, the Commission must evaluate the statements of the organization in a fact-intensive inquiry giving due weight to the form and nature of the statements, as well as the speaker's position within the organization.

~~The Federal courts' interpretation of the constitutionally mandated major purpose doctrine requires the Commission to conduct investigations into the conduct of specific organizations that may reach well beyond publicly available advertisements. See, e.g., *Malenick*, 310 F. Supp. 2d at 234-36 (examining organizations' materials distributed to prospective donors). The Commission may need to examine statements by the organization that characterize its activities and purposes. The Commission may also need to evaluate the organization's spending on Federal campaign activity, as well as any other spending by the organization. In addition, the Commission may need to examine the organization's fundraising appeals.~~

Because *Buckley* and *MCFL* make clear that the major purpose doctrine requires a fact-intensive analysis of a group's campaign activities compared to its activities unrelated to campaigns, any rule must permit the Commission the flexibility to apply the doctrine to a particular organization's conduct.

SE&J on Political Committee Status, 72 Fed. Reg. at 5601-02 (footnotes omitted) (internal citations omitted) (emphasis added).

13. The Commission has explicitly rejected the notion that an organization's self-proclaimed tax status (e.g., as a 501(c)(4) organization) determines whether such an organization has a "major purpose" of influencing federal elections. The Commission has found both 501(c)(4) and 527 organizations to have violated FECA by failing to register as political committees in recent years. As the Commission explained in its SE&J on Political Committee Status:

[T]he Commission's enforcement experience illustrates the inadequacy of tax classification as a measure of political committee status. The Commission recently completed six matters, including five organizations that were alleged to have failed to register as political committees. The Commission reached conciliation agreements with five of these organizations—four 527 organizations and one 501(c)(4) organization—in which the organizations did not contest the Commission's determination that they had violated FECA by failing to register as political committees. . . . The Commission has demonstrated through the finding of political committee status for a 501(c)(4) organization and the dismissal of a complaint against a 527 organization, that tax status did not establish whether an organization was required to register with the FEC. Rather, the Commission's findings were based on a detailed examination of each organization's contributions, expenditures, and major purpose, as required by FECA and the Supreme Court.

SE&J on Political Committee Status, 72 Fed. Reg. at 5598-99 (footnote omitted) (internal citations omitted).

14. As the Commission further explained in its SE&J on Political Committee Status:

Courts have cautioned the Commission against assuming "the compatibility of the IRS's enforcement * * * and FECA's requirements." The Commission is instead obligated to perform a detailed review of differences in tax and campaign finance law provisions rather than adopting the former as a proxy for the latter. The U.S. District Court recently reminded the Commission: "It is the FEC, not the IRS, that is charged with enforcing FECA." The detailed comparison of the Internal Revenue Code and FECA provisions required by *Shays I* demonstrates that the "exempt function" standard of section 527 is not co-extensive with the "expenditure" and "contribution" definitions that trigger political committee

status. Therefore, the use of the Internal Revenue Code classification to interpret and implement FECA is inappropriate.

SE&J on Political Committee Status, 72 Fed. Reg. at 5599 (internal citations omitted).

15. Consistent with this approach to analyzing political committee status, the Commission in 2006 announced a conciliation agreement with the 501(c)(4) organization Freedom Inc., having determined that the organization had a major purpose of influencing federal elections and that the organization had received contributions and made expenditures exceeding \$1,000 in a calendar year. See "Freedom Inc. Pays \$45,000 Penalty for Failing to Register as Political Committee," <http://www.fec.gov/press/press2006/20061220mur.html> (Dec. 20, 2006).

16. Prong 2: Contributions or Expenditures of \$1,000. The second prong of the definition of "political committee" is met if an entity that meets the "major purpose" test also receives "contributions" or makes "expenditures" aggregating in excess of \$1,000 in a calendar year. Both "contributions" and "expenditures" are defined to mean funds received or disbursements made "for the purpose of influencing" a federal election. 2 U.S.C. § 431(8), (9).

17. This second prong test—whether a group has made \$1,000 in "expenditures"—should not be limited by the "express advocacy" standard when applied to a "major purpose" group, such as American Future Fund. Rather, the test for "expenditure" in this case is the statutory standard of whether disbursements have been made "for the purpose of influencing" any federal election, regardless of whether the disbursements were for any "express advocacy" communication. The Supreme Court made clear in *Buckley* that the "express advocacy" standard does not apply to an entity, like American Future Fund, which has a major purpose to influence candidate elections and is thus not subject to concerns of vagueness in drawing a line between issue discussion and electioneering activities.

18. The Commission has incorrectly narrowly construed the term "expenditure" to encompass only express advocacy even with respect to "major purpose" groups. See SE&J on Political Committee Status, 72 Fed. Reg. at 5604. The U.S. District Court for the District of Columbia in *Shays v. FEC*, 511 F. Supp. 2d 19, 26-27 (D.D.C. 2007), rejected the Commission's application of the express advocacy standard to "major purpose" groups in a section of its opinion entitled "FEC's Misinterpretation of *Buckley*."³

19. If the Commission continues to incorrectly apply the "express advocacy" test to "major purpose" groups such as American Future Fund, the Commission regulations define "express advocacy" to include not only a communication that uses so-called "magic words" phrases such as "vote for" and "vote against," 11 C.F.R. § 100.22(a), but also a communication that "could only be interpreted by a reasonable person as containing advocacy of the election or defeat of one or more candidates because the electoral portion of the communication is unmistakable, unambiguous and suggestive of only one meaning and reasonable minds could not differ as to whether it encourages actions to elect or defeat one or more clearly identified candidates or encourages some other kind of action." 11 C.F.R. § 100.22(b). This "could only

³ The *Shays* court explained:

[T]he FEC believes that there is an "express advocacy requirement for expenditures on communications made independently of a candidate," which applies to all organizations regardless of whether they satisfy the "major purpose" test.

As plaintiffs contend, this is a misreading of *Buckley*. . . .

[T]he Court imposed the narrowing gloss of express advocacy on the term "expenditure" only with regard to groups other than "major purpose" groups. The Court has since reaffirmed this position. . . . Therefore, having misinterpreted *Buckley*, the FEC is applying the express advocacy requirement to expenditures in cases where it is unnecessary.

Shays v. FEC, 511 F. Supp. 2d at 26-27.

be interpreted by a reasonable person" standard is often referred to as "Subpart (b)" express advocacy.

20. The Commission explained in its SE&J on Political Committee Status its application of the Subpart (b) express advocacy standard to nonprofit organizations active in 2004:

The Commission applied a test for express advocacy that is not only limited to the so-called "magic words" such as "vote for" or "vote against," but also includes communications containing an "electoral portion" that is "unmistakable, unambiguous, and suggestive of only one meaning" and about which "reasonable minds could not differ as to whether it encourages actions to elect or defeat" a candidate when taken as a whole and with limited reference to external events, such as the proximity to the election.

The Commission was able to apply the alternative test set forth in 11 CFR 100.22(b) free of constitutional doubt based on *McConnell's* statement that a "magic words" test was not constitutionally required, as certain Federal courts had previously held.

SE&J on Political Committee Status, 72 Fed. Reg. at 5604.

21. Furthermore, numerous court decisions in recent years, including the Supreme Court's decision in *FEC v. Wisconsin Right to Life*, 551 U.S. 449, 469-70 (2007), have made clear that the Subpart (b) standard is constitutional. *See also Real Truth About Obama v. FEC*, 2008 WL 4416282 (E.D. Va. 2008) ("Because section 100.22(b) is virtually the same test stated by Chief Justice Roberts in the majority opinion of *WRTL* . . . , the test enumerated in section 100.22(b) to determine express advocacy is constitutional."); *affirmed, Real Truth About Obama v. FEC*, 575 F.3d 342 (4th Cir. 2009) (The "language [of Subpart (b)] corresponds to the definition of the functional equivalent of express advocacy given in *Wisconsin Right to Life*. . . . By limiting its application to communications that yield no other interpretation but express advocacy as described by *Wisconsin Right to Life*, § 100.22(b) is likely constitutional.") (vacated for consideration of mootness by 130 S. Ct. 2371 (2010)).

III. Political Committee Registration, Organizational and Reporting Requirements

22. Any entity that meets the definition of a "political committee" must file a "statement of organization" with the Federal Election Commission, 2 U.S.C. § 433, must comply with organizational and recordkeeping requirements of 2 U.S.C. § 432; and must file periodic disclosure reports of its receipts and disbursements, 2 U.S.C. § 434. In addition, a "political committee" that does not confine its activities to "independent expenditures" is subject to contribution limits, 2 U.S.C. §§ 441a(a)(1), 441a(a)(2), and source prohibitions, 2 U.S.C. § 441b(a), on the contributions it may receive. 2 U.S.C. § 441a(f).

23. The reports required by FECA must disclose to the Commission and the public, including complainants, comprehensive information regarding such committee's financial activities, including the identity of any donor who has contributed \$200 or more to the committee within the calendar year. See 2 U.S.C. § 434(b). The Supreme Court has repeatedly recognized the importance of campaign finance disclosure to informing the electorate. See, e.g., *Citizens United v. FEC*, 130 S. Ct. 876, 915 ("[T]he public has an interest in knowing who is speaking about a candidate shortly before an election.").

IV. Applying FECA to American Future Fund

24. American Future Fund was organized in 2007 as a nonprofit organization under section 501(c)(4) of the Internal Revenue Code, see American Future Fund website, at <http://americanfuturefund.com>.

25. American Future Fund has a separate political action committee that provides direct support to candidates. <http://query.nictusa.com/cgi-bin/faoimg/?C00449926>.

26. According to published reports and the American Future Fund website, the organization was founded by well known conservatives "to provide Americans with a

conservative and free market viewpoint.” <http://americanfuturefund.com/about-us> The group released several ads against the health care bill last year, including some that were found to be misleading.

27. American Future Fund uses 501c(4) to secure contributions that will not be subject to disclosure to the public. These secret donations are an important part of its strategy.

See, Offering Donors Secrecy, and Going On the Attack

<http://www.nytimes.com/2010/10/12/us/politics/12donate.html>

28. Although American Future Fund under 501c(4) is not registered as a political committee, based on public information, complainants have reason to believe the organization is, in fact, a federal political committee: (1) complainants have reason to believe that American Future Fund has a “major purpose” to influence federal candidate elections, and (2) American Future Fund has reported to the Commission expenditures of more than \$1,000 this calendar year to influence the 2010 Congressional elections. As explained above, a federal political committee is required to register with the Commission, to comply with specific organizational and recordkeeping requirements, and to file periodic reports with the Commission, disclosing all receipts and disbursements. 2 U.S.C. §§ 432, 433 and 434. American Future Fund has not complied with these legal requirements.

29. American Future Fund Major Purpose: Complainants have reason to believe that American Future Fund’s major purpose this year is to influence the 2010 federal elections and to elect Republicans to federal office. As explained below, complainants believe American Future Fund satisfies the major purpose test “through sufficiently extensive spending on Federal campaign activity.” SE&J on Political Committee Status, 72 Fed. Reg. at 5601. Complainants believe the enormity of American Future Fund’s express independent advocacy expenditure

activity is likely to establish American Future Fund's "major purpose" as influencing the 2010 federal elections.

30. According to a published report, American Future Fund has now devoted more than half of its spending this year on television advertising on express advocacy campaign ads. A comprehensive analysis by the *New York Times* of the organization's television ads in 2010 tracked by the Campaign media Analysis Group, determined that American Future Fund has spent an estimated \$3 million on express advocacy television ads, or about 56 percent of its television advertising budget. Michael Lou, "Groups Push Legal Limits in Advertising," *New York Times*, <http://www.nytimes.com/2010/10/18/us/politics/18express.html> (Oct. 17, 2010).

31. American Future Fund announced in September 2010 that it is spending \$4 million in 13 congressional districts, an estimate that was later exceeded as shown below in FEC independent expenditure reports for October, including spending \$500,000 against Mark Schauer in Michigan, \$325,000 against Mike Oliverio in West Virginia and \$250,000 against Martin Heinrich in New Mexico. The ads in these races are essentially identical "cookie-cutter ads," with only the names of the candidates changed. Jason Hancock, "American Future Fund Targeting 13 Congressional Races," *Iowa Independent*,

<http://iowaindependent.com/44010/american-future-fund-targeting-13-congressional-races> (Sep. 27, 2010).

32. The American Future Fund ad against Martin Heinrich in New Mexico is representative of the group's express advocacy messages. The ad calls Heinrich a "Washington liberal" and slams him for voting for "Nancy Pelosi's agenda more than 97 percent of the time." The ad concludes: "This November, your vote can make Martin Heinrich disappear." Kyle Trygstad, "New Mexico: Conservative Group Targets Heinrich in Ad," *CQ Politics*,

<http://blogs.cqpolitics.com/eyeon2010/2010/09/new-mexico-conservative-group.html> (Sep. 9, 2010).

33. Furthermore, an "analysis of public statements" is also instructive in determining American Future Fund's purpose. SE&J on Political Committee Status, 72 Fed. Reg. at 5601. "Because such statements may not be inherently conclusive, the Commission must evaluate the statements of the organization in a fact-intensive inquiry giving due weight to the form and nature of the statements, as well as the speaker's position within the organization." SE&J on Political Committee Status, 72 Fed. Reg. at 5601. The American Future Fund website specifically states that it advocates conservative viewpoints, and its home page highlights its efforts to "target" what it calls "liberal politicians."

34. Finally, with respect to American Future Fund's major purpose, "[t]he Federal courts' interpretation of the constitutionally mandated major purpose doctrine requires the Commission to conduct investigations into the conduct of specific organizations that may reach well beyond publicly available advertisements. . . . [T]he Commission may need to examine the organization's fundraising appeals." SE&J on Political Committee Status, 72 Fed. Reg. at 5601.

35. American Future Fund "Expenditures": American Future Fund plans to spend up to \$25 million during the 2010 election season, *FactCheck.org*, <http://www.extremeconservatives.com/2010/10/american-future-fund/> and has reported more than \$6 million in independent expenditures to the Commission as of October 12, 2000. ftp://ftp.fec.gov/FEC/ind_exp_2010.csv. These expenditures meet and surpass the \$1,000 "political committee" expenditure threshold.

http://www.youtube.com/profile?user=AmericanFutureFund#p/u/16/t_peHEcQzIE. American Future Fund has created at least eighteen similar ads targeting the following candidates—Debbie Halverson, Chad Causey, Chet Edwards, Martin Heinrich, Stephanie Herseth Sandlin, Ed Perlmutter, Rick Larsen, Baron Hill, Travis Childers, Mike Oliverio, Denny Heck, Bobby Bright, John Spratt, John Adler, Gary McDowell, Jim Marshall, and Mark Schauer. Each of these ads uses the “vote against” language both in the audio and in the video text

<http://www.youtube.com/profile?user=AmericanFutureFund#g/u>

38. American Future Fund has posted other ads using the “vote against” language in the text. See e.g., *Pure Pelosi*, *Ed Perlmutter*

<http://www.youtube.com/profile?user=AmericanFutureFund#p/u/13/kPhU4-BR1Aw>

39. In sum, there is reason to believe that American Future Fund has a “major purpose” to support or oppose the election of particular federal candidates, and it has made “expenditures” for this purpose far in excess of the statutory \$1,000 threshold amount. The Commission accordingly should find reason to believe that American Future Fund has violated FECA political committee registration, organization and recordkeeping, and reporting requirements established by 2 U.S.C. §§ 432, 433 and 434. Pursuant to 2 U.S.C. § 437g(a)(2), the Commission should “make an investigation of such alleged violation”

V. Prayer For Relief

40. Wherefore, the Commission should find reason to believe that American Future Fund has violated 2 U.S.C. §§ 432, 433, 434 (and, potentially, 441a and 441b) and conduct an immediate investigation under 2 U.S.C. § 437g(a)(2). Further, the Commission should determine and impose appropriate sanctions for any and all violations, should enjoin the

respondent from any and all violations in the future, and should impose such additional remedies as are necessary and appropriate to ensure compliance with FECA.

October 12, 2010

Respectfully submitted,

Prosperity Agenda, Protect Our Elections,
Kevin Zeese Esq.
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Public Citizen
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Washington, D.C. 20003
202-454-5182

Verification

The complainants listed below hereby verify that the statements made in the attached Complaint are, upon their information and belief, true.

Sworn to pursuant to 18 U.S.C. § 1001.

For Complainant Protect Our Elections,
Prosperity Agenda, American Crossroads
Watch


Kevin Zeese Esq.
PO Box 9576
Washington, DC 20016
301-996-6582

Sworn to and subscribed before me this 19th day of October, 2010.


Notary Public

SEONG HEE SHIN
NOTARY PUBLIC STATE OF MARYLAND
My Commission Expires: September 24, 2011

Verification

The complainants listed below hereby verify that the statements made in the attached Complaint are, upon their information and belief, true.

Attested to pursuant to 18 U.S.C. § 1001.

For Complainant Center for Media and Democracy



10/19/2011

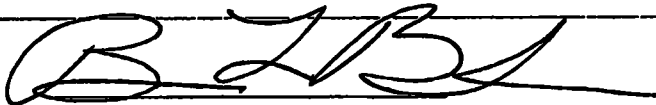
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State of Wisconsin
Dane County

Personally came before me this 19th day of October, 2010, the above-named

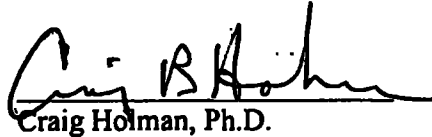
Lisa Graves

to me known to be the person who executed the foregoing statement.



My commission expires 5/22/11.

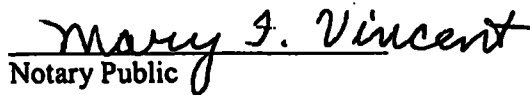
For Complainant Public Citizen



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DISTRICT OF COLUMBIA.

Sworn to and subscribed before me this 19 day of October, 2010.


Notary Public

MARY F. VINCENT
Notary Public, District of Columbia
My Commission Expires March 31, 2013

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